Before the
Federal Communications Commission
Washington, DC

In the Matter of	)	
Qwest Petition for Forbearance in the Omaha Metropolitan Statistical Area	)	WC Docket No. 04-223
	)	

COMMENTS OF COX COMMUNICATIONS, INC.

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SUMMARY

Qwest's petition for forbearance (the "Petition") is so flawed that the Commission should dismiss it summarily as facially deficient. Even if the Commission does not dismiss the Petition, it should deny Qwest's requests for forbearance from Sections 251(c)(1), (2), (3), (5) and (6) of the Communications Act of 1934.

The Petition Should Be Dismissed

The Petition is based on the premise that declines in market share in retail telecommunications markets are determinative of an incumbent LEC's obligations in the *wholesale* marketplace. Even if Qwest's factual claims were correct, this theory is inconsistent with the requirements of Section 10 of the Act, which demands analysis of the specific statutory provisions subject to a forbearance request and a determination of how forbearance would affect competitive LECs and their ability to compete. None of Qwest's evidence addresses its status as a ubiquitous interconnecting carrier. Qwest also does not show that any element of Section 251(c) is burdensome, let alone burdensome enough to overcome the competitive benefits that accrue from enforcing that section's requirements. Qwest also provides no evidence that forbearing from applying Section 251(c) would result in fair and reasonable interconnection arrangements in the future.

Moreover, the Petition is riddled with factual errors, including inaccurate and conflicting descriptions of the geographic area where Qwest seeks forbearance, a claim that Cox serves rate centers that it does not serve, and a significant error in Qwest's estimate of the number of customers purchasing telephone service from Cox. These errors erode the reliability of Qwest's showing on market share and competition and raise questions about the accuracy of everything in the Petition.

Either Qwest's failure to meet the requirements of Section 10 or its inability to provide accurate factual information would be sufficient to justify dismissal. Taken together, these facts require the Commission to dismiss the Petition forthwith.

The Individual Requests for Forbearance Should Be Denied

If the Commission reaches the question of whether it should grant Qwest's requests for forbearance from individual provisions of Section 251(c) of the Act, it will find that they must be denied. Compliance with Section 251(c) remains essential to the development and maintenance of competition in the Omaha market, and Qwest has provided no basis for any other determination.

Negotiation in Good Faith: Significant disparities in bargaining power remain between Qwest and competitive LECs, and the obligation to negotiate in good faith imposed by Section 251(c)(1) helps to reduce those disparities and to avoid the expense and delay of arbitration. Maintaining this requirement is important to telephone competition in Omaha because Qwest remains the one indispensable party for interconnection and has the ability and incentive to discriminate against its competitors in negotiations.

Interconnection at Any Point: Qwest is still the only ubiquitous carrier in the Omaha MSA and therefore the only carrier that connects to all other carriers. No other carrier could fill the gap if Qwest refused to provide interconnection on reasonable terms and conditions, as it currently is required to do under Section 251(c)(2). Qwest accordingly continues to possess the market power to raise prices for interconnection or create unnecessary burdens on other carriers, with the consequent adverse effects on competition and consumers. Relieving Qwest of its Section 251(c)(2) obligations also would allow Qwest to increase transit rates or force carriers to interconnect directly with each other, even when doing so is uneconomic and technically inefficient. Because few carriers exchange enough traffic to justify direct interconnection, the burden on competition would be severe, with no benefits in network efficiency.

Unbundled Elements: The Petition effectively asks the Commission to overturn the unopposed findings in the *Triennial Review Order* that access to low-capacity residential and business loops and to certain subloops pursuant to Section 251(c)(3) is necessary to avoid impairment. Qwest provides no evidence to overcome those findings. While Cox does not primarily rely on these UNEs, it sometimes has to do so to reach customers that are not on the Cox network, and forbearing from requiring Qwest to provide loops would prevent Cox from providing competitive service to those customers.

Collocation: Collocation under Section 251(c)(6) is the only way that a carrier can bring traffic to Qwest switches without relying on Qwest's or another party's facilities. There is no effective substitute for collocation at Qwest's switches. Qwest provides no evidence that collocation is burdensome to it and, in fact, Cox pays all of the costs of collocation even when Qwest uses the Cox collocation facility to route its outbound traffic. The importance of collocation to competitive facilities-based LECs far outweighs the unsubstantiated and at best minimal burdens it may impose on Qwest.

Network Change Notification: The network change notifications ensure that carriers can exchange traffic efficiently and would be necessary even if they were not required by Section 251(c)(5). Regardless of Qwest's market share, its network changes are more significant than any other carrier's because of its position as the only ubiquitous interconnecting party. Qwest provides no evidence at all to support forbearance from this requirement.

"Full Implementation": To obtain forbearance from Section 251 or Section 271 requirements, an incumbent LEC must show that those sections have been fully implemented.

Qwest's only effort to meet this requirement is to claim that grant of its Section 271 application meets this standard. The Commission has rejected this theory implicitly in the *OI&M Forbearance Order*, and Qwest's own failure to file interconnection agreements in several states demonstrates that it has not been in full compliance with the competitive requirements of the Communications Act. In the absence of any additional showing, the Commission must conclude that Qwest has not met its burden.

* * * *

In evaluating the specific provisions for which Qwest seeks forbearance, the Commission also must consider the risk that Qwest has very strong incentives to and indeed will engage in anticompetitive behavior. Given Qwest's track record (particularly as to the filing of interconnection agreements) the reliance of competitors on Qwest's network, and Qwest's scale and scope, the risk that Qwest will engage in such behavior is high. If the Commission, instead of dismissing the Petition, proceeds to consider Qwest's request, these facts must weigh heavily against the Petition.

Non-Dominant Status

Cox takes no position on Qwest's request for non-dominant status. However, to the extent the Commission considers that request, it also must recognize the potential effects of Qwest non-dominance on the CLEC access charge rules. Any order that permits Qwest to modify access charges freely also should give competitive LECs more flexibility in complying with their obligation to mirror incumbent LEC rates in the Omaha MSA.

Forbearance from Incumbent LEC Status

Qwest's request for forbearance from incumbent LEC status is merely a back door attempt to obtain the same relief that it cannot obtain via the rest of its Petition. In fact, Qwest retains all of the indicia of incumbent LEC status, including its status as the only ubiquitous carrier in the Omaha MSA and the only carrier that interconnects directly with all competitive LECs, incumbent LECs, interexchange carriers and wireless carriers. Qwest also is the carrier of last resort and the central carrier for E911 service. Until another carrier supplants Qwest in providing these functions, Qwest will remain the incumbent LEC in Omaha.

Qwest's suggestion that Cox should be classified as an incumbent LEC is even less justified. Qwest has not met the procedural requirements for requesting such a determination, but even if it did there would be no basis for reclassifying Cox. Cox does not meet the criteria adopted by the Commission in the *GTA NPRM*, which requires findings as to dominant market status, the ability of the carrier to serve the entire market area and the effect of treating the carrier as an incumbent on competitive entry. Further Cox is not ubiquitous, does not interconnect directly with all other carriers, is not a carrier of last resort and does not provide E911 connectivity.

Qwest also has not made any showing, as required by the *GTA NPRM,* that classifying Cox as an incumbent would foster competitive entry, and in fact the opposite likely would be true. The reality is that Qwest is the incumbent LEC in the Omaha MSA and that requiring Qwest's continued compliance with its obligations as an incumbent LEC under Sections 251(c) and 271 of the Act is entirely justified.

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COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc., on behalf of its affiliates Cox Iowa Telcom, L.L.C. and Cox Nebraska Telcom, L.L.C. (collectively, "Cox"), by its attorneys, hereby submits its comments in the above-referenced proceeding.[1] As shown below, the proof supporting Qwest's generalized request for forbearance in the Omaha MSA is so deficient that the Commission should summarily dismiss the Petition for failure to make even a prima facie case. Alternatively, the Commission, rather than accepting Qwest's sweeping generalizations, should consider each element of Qwest's request in the context of the specific regulatory requirements that Qwest seeks to avoid, and deny the Petition.

I. Introduction

Cox is the leading competitive provider of facilities-based local telephone service, with well over one million lines in service. Cox now provides local residential and business telephone service in thirteen markets across ten states, including much – but not all – of the Omaha MSA.[2] As Cox has described to the Commission on many occasions, facilities-based providers have different needs than other competitive carriers.[3] While these needs are more limited than those

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[1] Petition of Qwest Communications, Inc. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, filed June 21, 2004 (the "Petition").

[2] Cox Iowa Telcom, L.L.C. and Cox Nebraska Telcom, L.L.C. are indirect, wholly-owned subsidiaries of Cox Communications, Inc., and are the operating entities that hold the state certificates to provide telephone service in Iowa and Nebraska, respectively.

[3] *See, e.g.,* Comments of Cox, IP-Enabled Services, WC Dkt. No. 04-36 (filed May 28, 2004).

of carriers that rely on unbundled network elements, local telephone competition will come to a halt if they are not met. Consequently, Cox has a unique perspective on this proceeding.

Qwest has asked for sweeping forbearance in the Omaha MSA, basing its request on claims that it has lost a significant share of the retail market share for local telephone services. Cox submits that the Commission should view that request in light of three specific considerations.

First, company-specific forbearance requests should meet a heavy burden of particularized proof. Unlike requests that seek forbearance for a particular segment of the industry, which affect all similarly situated carriers in the same way, company-specific requests ask the Commission to treat one carrier better than others by granting it special regulatory relief. Because forbearance for a single carrier potentially gives it a significant advantage over its peers, obtaining such special relief should require a stronger and more specific showing than obtaining generic relief.[4] For this reason, company-specific forbearance petitions should be treated like waiver requests and be subject to a "high hurdle" at the outset.[5]

Second, the Petition is focused on a specific, Qwest-defined area – the Omaha MSA. This area has been chosen without reference to the nature of the requirements for which Qwest is seeking forbearance and, in fact, would create substantial problems when the application of other Commission rules and policies is considered. For example, universal service and access charges are based on study areas, and interconnection agreements are entered into on a statewide basis. Yet Qwest has provided no explanation for how to reconcile the Commission's rules and the Act

[4] For instance, investors are likely to find it more attractive to provide funding to a company that has been granted forbearance, lowering its capital costs.

[5] *See generally WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (parties requesting waivers face a "high hurdle" to demonstrate necessity of special relief from the rules).

with the MSA-specific forbearance it has requested. In particular, granting the request would create significant difficulties under the interconnection arbitration and opt-in rules. The rules do not contemplate that an incumbent LEC can reject an opt-in request based on the specific location within a state where the competitive LEC wishes to receive interconnection, yet that could be the practical effect of granting the Qwest request.[6] Similarly, except for the specific rules requiring rate differentiation in different density zones, arbitrators are not empowered to reach different arbitration results for different parts of a state.[7] These are only a few of the issues raised by the mismatch between Qwest's request and the rules it seeks to have forborne.

Third, the Commission's analysis of forbearance requests must be specific to the provisions for which forbearance is sought. In particular, the evidence to support the findings necessary for forbearance must be linked directly to the provisions for which forbearance is requested; generalized statements or even generalized evidence about the state of competition is not sufficient. If, for example, the provision at issue relates to the relationship between incumbent LECs and competitive LECs, the evidence must show specifically that forbearance will not damage the ability of competitive LECs to compete.

These comments will demonstrate that Qwest has not met its burden to obtain relief from those elements of Section 251(c) that affect facilities-based competitive LECs, including negotiating in good faith, interconnection at any point, collocation and access to the unbundled loop. In every case, Qwest's generic evidence is not sufficient to meet its burdens, and the facts demonstrate that forbearance would be inappropriate as to each of these elements. Qwest also essentially asks the Commission to overturn recent national findings as to access to the unbundled loop, with no evidence specific to that element at all. In analyzing these requests, the

[6] 47 C.F.R. § 51.809.

[7] 47 C.F.R. § 51.507(f).

Commission not only must assess whether Qwest has met its burden, but also must account for the likelihood that forbearance will create incentives for Qwest to act to stifle competition.

Qwest's request for non-dominance also raises questions, particularly as to what services are covered and as to the effect of a non-dominance determination on competitive LECs in light of the Commission's competitive LEC access rules. Finally, Qwest's requests to be relieved of incumbent LEC status and to have that status imposed on Cox do not merit serious consideration. Qwest maintains all of the basic indicia of incumbent LEC status, while Cox has none. For these reasons, the Commission should dismiss the Petition as facially deficient or, in the alternative, deny the relief requested by Qwest.

II. Legal Framework

In the Petition, Qwest seeks relief from several requirements of the Communications Act and the Commission's rules pursuant to the forbearance provisions of Section 10(a) of the Act.[8] That section establishes exacting standards and requires particularized Commission findings that continued enforcement of a rule or statutory requirement is not necessary to: (1) ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; (2) maintain adequate consumer protections; and (3) protect the public interest.[9] Although Qwest has included a great deal of argument as to why it should be freed of all dominant carrier regulation under the Act, nondominance analysis is irrelevant to this case because it does not address the specific factors that must be satisfied for forbearance. Likewise, Qwest's brief request for relief from incumbent LEC regulation in Omaha does not address the showing necessary for forbearance under Section 10(a); nor does its unsupported assertion that Cox is actually the "incumbent LEC" in the Omaha MSA.

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[8] *See* 47 U.S.C. §§ 160(a), 251(c), 271.

[9] *See id.*, § 160(a)(1)-(3).

A. Section 10(a) Requires Particularized Showings and Commission Findings of Consumer and Competitor Protections in the Absence of the Challenged Regulations.

Under Section 10(a), the Commission must first find that enforcement of its rules and the relevant provisions of the Communications Act is unnecessary to ensure that Qwest's rates and practices are just, reasonable and not unreasonably discriminatory.[10] As the Commission has stated, "In order to satisfy the first prong of the three-part forbearance analysis, the [] petitioner[] must make a *prima facie* showing that sufficient competition exists so that application of the Commission's . . . rules is not necessary to ensure that the [] petitioner[']s[] rates and practices for the services in question are just, reasonable and not unreasonably discriminatory."[11] Accordingly, to meet this standard, a carrier must show that both its rates *and* practices will be reasonable in the absence of regulation.[12] This requirement applies to all carrier practices, not just those directly involving consumers.[13] Indeed, because consumer protection is considered elsewhere in the forbearance analysis, the first prong ought to focus more heavily on the requesting party's intercarrier practices.

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[10] *See id.*, § 160(a)(1).

[11] Petition of U S WEST, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 19947, 19966-67 (1999).

[12] *See* Bell Operating Companies: Petitions for Forbearance, *Memorandum Opinion and Order*, 13 FCC Rcd 2627, 2644-48 (1998) (conditionally granting forbearance after examining effect of discriminatory access to local number listing services on LEC rates and several discreet intercarrier practices).

[13] *See, e.g.*, Numbering Resource Optimization: Petition for Forbearance from Further Increases in the Numbering Utilization Threshold, *Memorandum Opinion and Order*, 18 FCC Rcd 13311, 13315 (2003) (evaluating carrier practices with respect to number utilization); Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, *Memorandum Opinion and Order*, 14 FCC Rcd 16252, 16270-74 (1999) (describing nondiscriminatory access to in-region directory listing services as a carrier practice necessary to satisfying the enforcement standard in Section 10(a)(1)).

The second prong of the Section 10 forbearance test requires a showing that the contested regulations are not necessary to protect consumers.[14] The Commission's consumer protection analysis requires an examination of both the direct and indirect effects of forbearance on consumers. Direct consumer impact analysis is appropriate when the provision at issue, e.g., tariffing, has a direct effect on end users. For example, in the case of wireless number portability, the Commission denied a request for forbearance because it found that as more and more customers substitute wireless phones for their landlines and vice versa, the inability to port numbers would harm consumers directly, because they would be discouraged from going through the trouble and expense of changing phone numbers.[15]

Many provisions of the Act, however, and particularly those at issue in this case, may not involve consumers directly but nevertheless have an important role in protecting consumers and competition. The interconnection requirements of Section 251(c), for example, have no direct effect on consumers, but removing these requirements would threaten to raise consumer prices and impair telephone service by making it more difficult for new entrants to compete. Accordingly, the Commission has held consistently that indirect negative effects on consumers are sufficient to support a finding that forbearance would not adequately protect consumers. In such cases, the Commission first focuses on the effects the requested forbearance would have on other carriers and, from that analysis, deduces the indirect effects on consumers.

For example, the Commission focused initially on the effects on other carriers when it rejected a forbearance request that the Commission allow carriers with declining revenues to pay

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[14] 47 U.S.C. § 160(a)(2).

[15] *See* Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, *Memorandum Opinion and Order*, 17 F.C.C.R. 14972, 14981 (2002), *aff'd*, *Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502 (D.C. Cir. 2003) ("*Wireless LNP Order*").

decreased universal service contributions based on estimated current-year revenues.[16] The Commission found that granting the petitioner's request would simply increase the universal service payments of other carriers, and that the increase eventually would be passed on to those carriers' consumers.[17] Accordingly, the Commission held that forbearance would not adequately protect consumers. Similarly, in its competitive LEC access charge reform proceeding, the Commission discussed whether tariffing of competitive LEC access charges above the benchmark is necessary to protect consumers.[18] The Commission determined that it was not, preferring instead a regime that required negotiation of such rates, but only after examining the indirect effects that such negotiations would have on the rates paid by competitive LEC, incumbent LEC and IXC end users.[19]

In this case, the regulations Qwest challenges govern intercarrier relationships, so the Commission must consider the indirect effects that forbearance would have on competition and consumers. As shown below, the indirect effects of permitting Qwest to avoid, for example, the interconnection requirements of Section 251 and the nondiscriminatory unbundling requirements of Section 271(c)(2)(B) would injure consumers through increased rates, impaired service and decreased competition.

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[16] Federal-State Joint Board on Universal Service, Petition for Forbearance from Enforcement of Sections 54.709 and 54.711 of the Commission's Rules by Operator Communications, Inc. d/b/a Oncor Communications, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 4382, 4386-87 (2001).

[17] *See id.*

[18] Access Charge Reform, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 9923, 9961 (2001).

[19] *See id.*

The third prong of the Commission's forbearance analysis examines whether the forbearance request is consistent with the public interest.[20] As Qwest acknowledges, this prong requires the Commission to consider whether forbearance will promote competitive market conditions and enhance competition.[21] Where the Commission has found that the rule from which forbearance is sought is itself likely to enhance long-term market competition, the public interest weighs against forbearing from enforcing the rule.[22] Thus, if granting forbearance would reduce existing competition *or* if it would interfere with the pro-competitive effects that the statute is designed to create, the Commission must reject the forbearance request.

Although Section 10 plainly provides the proper analytic framework for addressing the Petition, Qwest relies repeatedly on its assertion that it no longer is the dominant carrier in Omaha because it has lost market share in the local retail market.[23] Non-dominance in the retail market, however, does not directly address the three statutory standards relevant to forbearance requests. Moreover, as described below, the decrease in Qwest's market share in Omaha does not limit its ability to frustrate competition because it continues to hold sufficient power in the wholesale market to engage in anticompetitive intercarrier practices. That ability is at the heart of the continued regulation of incumbent providers like Qwest in Omaha, and because Qwest's declining market share has not diminished its ability to unfairly compete, the simple fact of that decline adds nothing to the forbearance analysis required under Section 10.

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[20] *See* 47 U.S.C. § 160(a)(3).

[21] Petition at 27-28; *see also* 47 U.S.C. § 160(b).

[22] *Wireless LNP Order*, 17 FCC Rcd at 14980.

[23] Petition at 18-20, 31-37.

B. Qwest Erroneously Asserts that the Commission Has Found that Sections 251(c) and 271 Have Been Fully Implemented.

In addition to satisfying the general Section 10(a) criteria for forbearance, Section 10(d) provides that any request for forbearance from Sections 251(c) and 271 of the Act also must support a Commission finding that those sections have been "fully implemented."[24] Despite Qwest's assertions to the contrary, the Commission never has made such a finding in general, let alone with respect to Qwest's operations in Iowa and Nebraska. In particular, the Commission never has adopted Qwest's position that a grant of Section 271 authority amounts to a Commission finding that Section 271 has been fully implemented.[25] The Commission also never has considered whether Section 251(c) has been fully implemented in a particular state or states.[26] Indeed, until the filing of the Petition, the Commission never has entertained a request for forbearance from Section 251(c), let alone determined that its provisions have been "fully implemented" either nationally or in any market.

To the extent that Qwest claims that the Commission's grant of Section 271 authority in Iowa and Nebraska amounts to a finding that Sections 251(c) and 271 have been "fully implemented," the Commission already has implicitly rejected that argument.[27] In the *Verizon OI&M Forbearance Order*, the Commission refused to forbear from enforcing BOC separation

[24] 47 U.S.C. § 160(d).

[25] *See* Petition of SBC Communications, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 5211, 5217-18 (released March 19, 2004); *see also id.* (Separate Statement of Commissioner Kathleen Q. Abernathy, concurring) ("I continue to believe that the Commission should revisit its conclusion that full implementation [of Section 271] has yet to occur.").

[26] *See id.* at 5218 (noting that the Commission has considered the meaning of "fully implemented" only in the context of the interplay between Section 271 and 272).

[27] *See* Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 18 FCC Rcd 23525 (2003) ("*Verizon OI&M Forbearance Order*"), *appeal pending*, *Verizon Tel. Cos. v. FCC*, D.C. Cir No. 03-1404.

requirements contained in Section 272 of the Act. The Commission found that the Section 272 requirements incorporated the Section 271 requirement that forbearance not occur until that section is "fully implemented."[28] The Commission noted that it had yet to find that the "fully implemented" standard had been fulfilled, even though Verizon already had been granted 271 authority throughout its service area at the time of the order. Thus, the Commission implicitly concluded that Section 271 is not "fully implemented" simply because a carrier has been granted 271 authority in its markets.

In short, Qwest asks the Commission to find conclusively that Sections 251(c) and 271 have been fully implemented, but it provides no arguments or evidence in favor of its position other than the Commission's prior grant of Section 271 authority to Qwest in Iowa and Nebraska. Yet there is nothing in that order to support Qwest's assertion that the Commission implicitly reached such a momentous finding when it permitted Qwest to provide long distance service in Iowa and Nebraska.[29] The Commission should not make such a potentially far-reaching decision upon such a weak showing, particularly where, as here, that decision would depart from prior Commission pronouncements.

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[28] *See id.* at 23528-30.

[29] Moreover, even if an order granting Section 271 authority could demonstrate full implementation of Section 251(c) and Section 271, Qwest's argument that the order that granted it 271 authority in Iowa, Nebraska and seven other states is strong enough to support that finding is highly dubious. Qwest Communications International Inc.: Consolidated Application for Provision of In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, North Dakota, Montana, Utah, Washington and Wyoming, *Order*, 17 FCC Rcd 26303 (2002) ("*Iowa and Nebraska 271 Order*"). As Qwest knows, the *Iowa and Nebraska 271 Order* was issued when the Commission believed that Qwest had honestly represented that it had filed all of its interconnection agreements in all its markets. *Id.*, at 26570-71. The Commission has since been made aware that Qwest had filed all of its interconnection agreements only in those markets where it already had requested 271 authority. Qwest Corporation, *Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 5169, 5169-70 (2004); *see also infra* Section IV(B).

C. Forbearance From Incumbent LEC Regulation Requires the Same Showing as Any Other Forbearance Request.

Qwest also seeks a declaration that it is no longer an incumbent LEC in Omaha.[30] It bases this request on its asserted lack of market power in the Omaha MSA and its claim that continuing to apply incumbent LEC regulation "is no longer equitable or reasonable."[31] Neither of these assertions, however, is relevant to the Commission's forbearance standards, by which Qwest's Petition for relief from incumbent LEC regulation must be judged. Regardless of rhetoric, to be relieved of incumbent LEC regulations, Qwest must satisfy the provisions of Section 10(a), and its request for forbearance from Section 251(h)(1) does not even purport to show that Qwest satisfies these tests.[32]

Qwest also claims that if any carrier in Omaha should qualify as an incumbent LEC, it is Cox.[33] To the extent that the Commission treats this portion of the Petition as a request that Cox be treated as an incumbent LEC, Section 251(h)(2) provides the relevant procedural and substantive standards by which such a request should be judged. First, the statute requires that "[t]he Commission may *by rule*" decide to treat a local exchange carrier as an incumbent LEC if it meets certain enumerated standards.[34] The Commission has exercised its authority under Section 251(h)(2) on only one occasion, classifying the Guam Telephone Authority (the "GTA") as an incumbent LEC.[35] In that case, several parties had requested that the Commission classify

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[30] Petition at 37-39.

[31] *Id.*

[32] 47 U.S.C. § 251(h)(1).

[33] *Id.* at 38.

[34] 47 U.S.C. § 251(h)(2) (emphasis added).

[35] Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, *Report and Order*, 13 FCC Rcd 13765 ("*GTA Order*"). *See also* Guam Public Utilities Commission Petition

the GTA as an incumbent LEC as part of a proceeding arising from a declaratory ruling request, but the Commission instead found it necessary to commence an entirely new rulemaking to permanently classify the GTA as an incumbent LEC.[36] In finally classifying the GTA as an incumbent LEC, the Commission described its authority under Section 251(h)(2) as "express rulemaking authority."[37] Consistent with this precedent, it would be inappropriate for the Commission to decide in this proceeding that Cox is an incumbent LEC in Omaha. Instead, the Commission would be required to commence a new rulemaking to make that determination.

Substantively, to show that Cox is an incumbent LEC under Section 251(h)(2), Qwest would have to prove that Cox has substantially replaced Qwest as the incumbent local service provider in Omaha.[38] In *GTA*, the Commission determined that the Guam Telephone Authority was an incumbent LEC because (1) it occupied a dominant market position comparable to an incumbent LEC's, possessing economies of density, connectivity and scale that make efficient competitive entry difficult *(i.e.*, a quasi-monopoly position); (2) it provided local exchange service to virtually all of the telephone exchanges in its service area; and (3) treating the GTA as an incumbent LEC was likely to foster competitive entry.[39] To prevail on a claim that Cox should be considered as an incumbent LEC, Qwest would need to provide evidence that Cox possesses each of these indicia of incumbency. Qwest has submitted no such evidence and has not even alleged that Cox occupies anything approaching a dominant market position in the

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for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act; Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, *Declaratory Ruling and Notice of Proposed Rulemaking*, 12 FCC Rcd 6925 (1997) ("*GTA NPRM*").

[36] *GTA NPRM*, 12 FCC Rcd at 6940.

[37] *GTA Order*, 13 FCC Rcd at 13765, 13768-9.

[38] 47 U.S.C. § 251(h)(2)(B).

[39] *GTA NPRM*, 12 FCC Rcd at 6940, 6941, 6947-8; *GTA Order*, 13 FCC Rcd at 13767-8.

Omaha MSA. Accordingly, the Commission should give short shrift to Qwest's passing argument that Cox, not Qwest, is the incumbent LEC in Omaha.

III. Qwest Has Not Made Even a Prima Facie Case for Forbearance, and Consequently the Petition Should Be Dismissed.

Analysis of the Petition under the applicable legal standards demonstrates that there is no basis to grant it. The evidence Qwest provides does not come close to meeting the basic requirements for forbearance, both because it fails to address the relevant issues and because it contains many errors and misstatements.

Qwest's showing is so deficient that the Commission should summarily dismiss the Petition. Section 10 demands showings that address the specific elements of the forbearance standards, but Qwest provides almost no analysis that is specific to any statutory provision or regulatory requirement. Much like the early Section 271 applications that the Commission rejected as facially deficient, the Petition contains only the skeleton of the showing required by the statute. Unless and until Qwest can put flesh on those bones, there is no basis for consideration of the Petition and the relief that it seeks.

A. Qwest's Evidence Is Utterly Insufficient to Support Its Request.

The Petition rests its case almost entirely on evidence of declining market share in the retail telecommunications market in the Omaha MSA as a whole.[40] That evidence is generic, not specific to the provisions at issue and often factually incorrect. Moreover, the Petition fails to provide any evidence to demonstrate that the current requirements are burdensome in any way or that Qwest could be expected to negotiate reasonable interconnection arrangements with competitors absent rules that require it to do so.

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[40] *See, e.g.*, Petition at 3, 8-9, 14, 23.

First, Qwest's evidence relates exclusively to its status in a particular market: the market for retail local telecommunications services in the Omaha MSA. But most of Qwest's request does not address the retail environment; Qwest largely is seeking forbearance from its obligations as an interconnecting carrier in a *wholesale* environment. In fact, none of Qwest's evidence relates in any way to its status as an interconnector, its place in the interconnection marketplace or its interactions with other carriers seeking interconnection. This is crucial because it means that Qwest has failed to address one of the key elements of the forbearance analysis described above: By failing to provide evidence of the impact of forbearance on interconnection, Qwest has failed to demonstrate that forbearance will not have a negative effect on competition. The burden to make this demonstration falls entirely on Qwest, and Qwest's inability to connect the dots is fatal to its request.

Next, the Qwest Petition does not demonstrate that any of the requirements it wishes to eliminate are burdensome in any way or, for that matter, that the requirements result in terms for interconnection that are meaningfully different from the likely terms in a true commercial negotiation between equals. This should be a significant factor in the Commission's analysis, for the burden that will be relieved by forbearance needs to be weighed against the benefits of the regulation that would be foregone. If the petitioner does not demonstrate any burdens, there is nothing to weigh against the benefits of the regulation to competition and other carriers.[41]

In this context, the Commission also must recognize that it can give little or no weight to Qwest's promise to negotiate "voluntary agreements."[42] This promise is entirely unenforceable, especially because Qwest itself will decide what it thinks constitutes "working cooperatively

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[41] It is not enough for Qwest to say it does not wish to comply with Section 251(c). If it does not meet the prima facie burden of demonstrating some burden, its request cannot be granted and dismissal is justified.

[42] Petition at 26.

with other service providers" and because the Commission will have no mechanism to force Qwest to fulfill its promise. Indeed, a so-called "commercial agreement" likely will be an agreement that Qwest believes to be in its commercial interests, which is to say one that is as favorable to Qwest, and as unfavorable to its competitors, as possible. For that reason, the Commission should assume that Qwest will act entirely in its own interests – which would include effectively denying interconnection to competitors whenever possible – if forbearance is granted.

Finally, Qwest's failure to provide meaningful justification for the geographic area it has chosen makes it impossible for the Commission to grant the Petition.[43] The Petition contains no analysis to demonstrate that forbearance is justified in the specific areas that are subject to the request. For that matter, Qwest provides service in many portions of Iowa and Nebraska that are not covered by the Petition, yet does not explain why they are excluded. Should the Petition be granted, Qwest would be subject to differing regulatory regimes in different parts of the two affected states. Absent a compelling reason from Qwest to support such differential treatment, the Commission can only weigh the risks of pursuing such a patchwork, including the effects on competitive LECs' ability to compete across the state, the additional complexity of arbitrations for state-wide agreements and the effect on opt-in rights under Section 252(i). The Petition does not address (or even mention) any of these issues.

[43] As shown below, it is not clear that Qwest itself understands where it wishes to have relief. *See infra* Part III(B).

B. Significant Errors in the Factual Showing Make It Impossible for the Commission to Rely on Qwest's Claims.

The Petition contains a series of factual errors and mischaracterizations. These mistakes are both significant and surprising. Together they create a pattern of errors that renders Qwest's entire Petition unreliable.

The most important error is that Qwest does not appear to know what counties are in the Omaha MSA. The Petition says the MSA has five counties, but the Census Bureau says it has eight – Qwest omits one county in Nebraska and two in Iowa.[44] Qwest also apparently omits some counties – but not the same ones – from its population and household calculations, and comes up nearly 140,000 people and 70,000 households short of the totals from the 2000 Census.[45] Strangely, Qwest's calculations appear to include at least one county where it does not provide service while excluding counties that it does serve.

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[44] *Compare* Petition at 7 (describing the Omaha MSA as consisting of Douglas, Sarpy, Washington and Cass Counties in Nebraska and Pottawattamie County in Iowa) *with* United States Bureau of the Census, *METROPOLITAN STATISTICAL AREAS AND COMPONENTS, December 2003, WITH CODES,* at http://www.census.gov/population/estimates/metro-city/0312msa.txt (describing the Omaha MSA as consisting of Douglas, Sarpy, Washington, Cass and Saunders Counties in Nebraska and Pottawattamie, Harrison and Mills Counties in Iowa).

[45] *Compare* Petition at 7 (population of MSA is 629,294 and number of households is 241,721) *with* United States Bureau of the Census, *Census 2000 PHC-T-29. Ranking Tables for Population of Metropolitan Statistical Areas, Micropolitan Statistical Areas, Combined Statistical Areas, New England City and Town Areas, and Combined New England City and Town Areas: 1990 and 2000 at 50,* at http://www.census.gov/population/cen2000/phc-t29/tab02a.pdf (showing total population of 767,041 and individual populations of counties in MSA); Table 4: Annual Estimates of Housing Units for Counties in Nebraska: April 1, 2000 to July 1, 2003 (HU-EST2003-04-31), Population Division, U.S. Census Bureau, July 23, 2004, *at* http://eire.census.gov/popest/data/household/tables/HU-EST2003-04-31.pdf (Nebraska data, showing 263,506 households in relevant counties); *and* Table 4: Annual Estimates of Housing Units for Counties in Iowa: April 1, 2000 to July 1, 2003 (HU-EST2003-04-31), Population Division, U.S. Census Bureau, July 23, 2004, *at* http://eire.census.gov/popest/data/household/tables/HU-EST2003-04-19.pdf (Iowa data, showing 48,034 households in relevant counties) (total of 311,540 households in Omaha MSA in 2000 Census). Based on the Census Bureau data, it appears that Qwest omitted Harrison, Mills,

These mistakes make it difficult for the Commission (and other parties) to know whether Qwest's statistics in the rest of the Petition relate to the same area as is covered by the forbearance request or even exactly where Qwest is seeking forbearance. For instance, it is impossible to evaluate Qwest's claim that its "DSL subscriber base in the Omaha area was approximately 6,000 in May 2004" without knowing if the "Omaha area" correlates to the MSA as described in the Petition, the actual MSA, or some other geographic subset.[46] Moreover, by understating the number of people and households in the MSA, Qwest makes it appear that competition is greater than it actually is.

Qwest's errors include its descriptions of Cox and Cox's services. Remarkably, Qwest claims that there are 360,000 residential "households that are current or potential Cox customers within the defined market," a number that exceeds Qwest's estimate of the *total* number of households in the MSA (241,721) by nearly 50 percent.[47] Separately, Qwest calculates that Cox is providing telephone service to approximately 148,000 households in the MSA based on Cox's

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Pottawatamie and Washington Counties from its population calculations. It is not clear what Qwest omitted from its calculation of the number of households in the MSA.

[46] Petition at 12, n.38. Qwest's figure is particularly surprising in light of the Commission's own statistics on broadband service in Nebraska and Iowa. If Qwest's information is to be believed, its DSL penetration in the Omaha MSA constitutes only about eight percent of total DSL penetration in Iowa and Nebraska, even though the Omaha MSA accounts for 16.5% of the population of the two states. *See* High-Speed Services for Internet Access: Status as of December 31, 2003, Industry Analysis and Technology Division, Wireline Competition Division, rel. June 8, 2004, Table 7 (showing broadband lines in Iowa and Nebraska by service type). Given that Qwest almost certainly concentrated its initial DSL deployment in urbanized, higher income areas like the Omaha MSA, it is unlikely that this figure is accurate.

[47] *Compare* Petition at 7 (241,721 households in the MSA) *with id.* at 8, n.23 (claiming that Cox "revenue generating units" are equivalent to households Cox can serve in the MSA). This discrepancy likely arises because Qwest misunderstands the meaning of "revenue generating units," a term that refers to the total number of services (voice, video and data) purchased by Cox customers. *See, e.g.,* Cox Communications, Inc., 2002 Summary Annual Report at 6, *available at http://media.corporate-ir.net/media_files/irol/76/76341/reports/2002AR.pdf.* Because many Cox customers choose to purchase multiple services, it is not possible to relate the number of revenue generating units to the number of homes passed.

report of 50 percent penetration. However, Cox calculated its telephone penetration based on the number of homes that actually purchase basic cable service, a significantly smaller number than the 295,000 "serviceable homes" used by Qwest.[48] In light of these mistaken assumptions, it is no surprise that Qwest overestimates Cox's actual number of customers by 30 percent.[49] In a petition that relies heavily (if inappropriately) on retail market share analysis, this is a serious mistake.

Qwest's errors concerning Cox extend even to the areas Cox serves. The Petition states that Cox "now offers CATV-based telephony service throughout all of Qwest's service territory in the Omaha MSA using its own coaxial fiber network."[50] Cox does not, however, provide service in six of the twenty-four wire centers identified as part of the Qwest service area in the Petition.[51]

In fact, Qwest's description of the wire centers in the Omaha MSA is itself inaccurate. More than fifteen months before the Petition was filed, the Nebraska Public Service Commission

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[48] Petition at 12 n.38. In the same footnote, Qwest estimates the availability of cable modem service from Cox by saying that "each of these households [that purchase Cox telephone service] has direct access to Cox broadband service." It is not apparent, however, why Qwest believes that the number of Cox cable modem customers has any relation to the number of Cox telephony customers. Perhaps Qwest believes that Cox has mimicked the Qwest practice of tying DSL and telephone service, but that is not the case. While Cox offers discounted bundles of service, it does not require its Omaha customers to purchase either cable service or telephone service to purchase cable modem service.

[49] *See, e.g.*, Virgil Larson, *Competition hot in Omaha phone war,* OMAHA WORLD HERALD, Sep. 17, 2003 at 1 (Cox has 106,000 residential subscribers).

[50] Petition at 8.

[51] Petition at 19 n.60. The Qwest wire centers that are not served by Cox are Springfield in Nebraska and Glenwood-Mineola, Malvern, Missouri Valley, Neola and Underwood in Iowa.

issued an order, in a proceeding initiated by Qwest, consolidating five of the listed rate centers into two new rate centers.[52]

Qwest's claims about the increasing level of competition in the Omaha MSA also rest on several questionable assumptions about the impact of DSL, wireless and voice over IP on Qwest's local exchange service. Qwest, for example, does not accurately characterize the reasons for the declining number of access lines it serves because the Petition fails to account for DSL service. Many "lost" access lines actually are second lines converted to DSL. This conversion results in an incremental increase in revenue to the incumbent LEC. Accordingly, excluding DSL from Qwest's description of the competitive landscape paints an incomplete picture.

Qwest engages in a similar sleight of hand with wireless services because it fails to acknowledge that a Qwest affiliate is a significant provider of wireless service in the Omaha MSA. For that matter, Qwest overstates the impact of both wireless service and voice over IP, neither one of which has taken any significant number of customers from traditional wireline service.[53] For instance, Qwest's own witness in a pending Iowa deregulation proceeding has stated in prefiled testimony that only four percent of disconnects are customers switching to wireless.[54] Similarly, analyses that simply show wireless minutes increasing must be

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[52] *See Order Approving Rate Center Consolidation*, App. No. C-2830/PI-66, Neb. Pub. Serv. Comm'n, Mar. 11, 2003.

[53] *See, e.g.*, Number Portability: Implementation and Progress, FCC Presentation, May 13, 2004, at 5, *available at* http://hraunfoss.fcc.gov/edocs-public/attachmatch/DOC-247179A1.pdf (wireline to wireless ports are less than 3.6 percent of all numbers ported).

[54] Qwest Corporation Statement of Position and Exhibits of Robert H. Brigham, Iowa Utils. Bd., Docket No. INU-04-01.

accompanied by the recognition that those minutes often are replacing long distance minutes, not local calls.[55]

Qwest also overstates the impact of voice over IP services. Despite Qwest's claims, voice over IP accounts for only a tiny fraction of local telephone service today.[56] In Iowa and Nebraska, voice over IP customers who want to replace their local telephone service must purchase broadband service, such as Qwest's DSL, to obtain service and, in any event, Qwest has made a commitment to be a voice over IP provider itself.[57]

Taken together, these errors, omissions and mischaracterizations are quite important. They not only erode the reliability of Qwest's showing on market share and competition, but also raise questions about Qwest's ability to provide the Commission with accurate information in the first place. Many of these errors could have been avoided by checking easily-retrieved data, often simply by conducting an Internet search. Some of the errors, such as the inaccurate descriptions of the Omaha MSA and its population data, make Qwest's factual claims appear stronger than they are, and consequently should be decisionally significant on their own. Even the trivial errors are so numerous, however, that they create a pattern of disregard for the facts that the Commission cannot ignore, and should address by dismissing the Petition.

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[55] The advent of wireless plans that charge the customer a flat amount until she reaches a monthly limit has encouraged this substitution.

[56] Vonage, the leading provider of voice over IP, serves only 225,000 lines customers across the country. Press Release, Vonage Now Offers 311 Dialing for city Information Services," Aug. 18, 2004, *at* http://www.vonage.com/corporate/press_index.php?PR=2004_08_18_0.

[57] Cox affiliates are beginning to provide IP-based voice services over their cable facilities, using technology that does not require customers to purchase a broadband connection, but that service is not available in Iowa or Nebraska at this time.

C. The Commission's Early Section 271 Precedent Supports Summary Action on The Petition.

In its early Section 271 proceedings, the Commission showed that it will not grant regulatory relief to incumbent LECs on the basis of facially incomplete or inaccurate showings. To forestall similar efforts by incumbents to obtain unwarranted forbearance, the Commission should apply the same principle here and dismiss the Petition.

In the early Section 271 cases, the incumbent LECs tried to acquire long distance authority without actually providing evidence that they had complied with the requirements of the statute.[58] In Michigan, for example, Ameritech withdrew its initial 271 application to avoid having it summarily dismissed due to its obvious deficiencies.[59] When Ameritech filed an application for the same authority three months later, the Commission denied the request, noting several factual shortcomings that made it impossible to determine that Ameritech was truly opening its Michigan markets to fair competition.[60] Similarly, the Commission took just over

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[58] *See, e.g.*, Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services In South Carolina, *Memorandum Opinion and Order*, 13 FCC Rcd 539 (1997)) (separate statement of Commissioner Ness) ("In sum, BellSouth's unfulfilled responsibilities unfortunately leave us no alternative but to deny the application."). *See also* Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, *Memorandum Opinion and Order*, 16 FCC Rcd 6237, 6380 (2001). ("As we held in prior section 271 orders, the reliability of reported data is critical: the performance measures must generate results that are meaningful, accurate, and reproducible.").

[59] Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, *Order*, 12 FCC Rcd 2088 (1997).

[60] Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, 12 FCC Rcd 20543, 20667, 20693 (1997) (*E.g.* "We find that Ameritech has provided the Commission with inadequate data by which to compare the quality of the interconnection that Ameritech provides to others to that which Ameritech provides itself.) (finding insufficient evidence to determine checklist compliance for interconnection, 911 database access, and OSS access).

two months to reject SBC's initial bid for Section 271 authority in Oklahoma. In that case the Commission faulted deficiencies in the findings regarding SBC's market-opening activities submitted by the Oklahoma Corporation Commission, findings which could only have been based on SBC's showing before that agency.[61] Moreover, the Commission made plain that SBC's showing was nowhere near that necessary to permit the FCC to grant Section 271 authority, as the application was dismissed with a short 44-page order.[62]

The Petition should be subject to the same fate. Qwest has made no attempt to make the particularized showings required by Section 10. It has made no connection between its claims concerning market share and the effects forbearance would have on competitors; has not addressed any of the implications of forbearance; has not shown that the regulations are burdensome; and has not made even a cursory effort to show that it has fully implemented Sections 251 and 271. These facts alone justify dismissal.

Even if the Commission could rely on Qwest's only real claim – that declining market share automatically equals declining market power in both retail and wholesale markets – Qwest has not demonstrated with precision its declining market share and other carriers' increasing shares. Qwest's failure to provide accurate information leaves the Commission with no reliable basis for making findings regarding the competitive conditions in the Omaha MSA. Because its claims are so intertwined with the faulty data it has provided, there is no basis for the Commission to even examine the merits of its claim. Under these circumstances, the Commission's only viable option is to follow the path it laid out in the *Michigan 271* proceeding

[61] Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services In Oklahoma, *Memorandum Opinion and Order*, 12 FCC Rcd 8689, 8695-96 (1997).

[62] *See id.* at 8723-4, 8728 (separate statement of Chairman Hundt) ("In the present application, SBC has plainly failed to meet the standards set forth in Section 271.")

and summarily dismiss Qwest's Petition – or give Qwest the opportunity to dismiss the Petition itself.

IV. If the Commission Does Not Dismiss the Petition in Its Entirety, the Commission Should Deny Forbearance as to Section 251(c) and Parallel Elements of Section 271.

For the reasons described in Part III, the Commission need not reach the specific elements of Section 251(c) because Qwest's proof is insufficient to justify any forbearance. Individual analysis, however, yields the same results for each of the provisions of Section 251(c) that are of interest to facilities-based competitors.[63] At the same time, granting the Petition would enhance Qwest's ability to exercise its market power and engage in new anticompetitive behavior. Consequently, if the Commission elects not to dismiss the Petition, it should deny forbearance as to Sections 251(c)(1), (2), (3), (5) and (6).

A. Qwest Cannot Meet the Standards for Forbearance as to Specific Provisions of Section 251(c).

Forbearance from the individual elements of Section 251(c) demands analysis of the unique characteristics and reasons for each of those requirements. The Petition provides no such analysis and, consequently, misses the mark for each of the provisions described below. Indeed, there are affirmative reasons why each provision continues to be necessary to protect competition, so there is no basis for permitting Qwest to avoid them.

1. The Obligation to Negotiate in Good Faith.

The first requirement under Section 251(c) is the obligation of incumbent LECs to bargain in good faith when negotiating interconnection agreements. All carriers – interexchange carriers, wireless carriers and competitive LECs – must be able to interconnect with incumbent LECs on reasonable terms if they are to serve customers. When the Commission adopted its

[63] The same analysis applies to the provisions of Section 271 that parallel Section 251. For that reason, Cox will not discuss Section 271 separately below.